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CPI Competition Policy Institute

Mr. William Caton
Secretary
Federal Communications Commission
1919 M St. NW
Washington, D.C. 20554

Reply Comments concerning the Application of SBC Communications to provide InterLATA Service in Oklahoma, **CC Docket No. 97-121**

Dear Mr. Caton:

Enclosed for filing are 11 copies and an original of CPI's Reply Comments in the above-captioned matter. Please also find a diskette containing electronic copies of CPI's Reply Comments in this proceeding and CPI's Initial comments in this proceeding filed on May 1, 1997. CPI neglected to provide a diskette with an electronic copy of the initial comments at the time the initial comments were filed. Thank you.

Sincerely,

John Windhausen, Jr.
General Counsel

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	
and Southwestern Bell Communications	)	CC Docket No. 97-121
Services, Inc. d/b/a Southwestern Bell	)	
Long Distance for Provision of In-Region	)	
InterLATA Services in Oklahoma	)	
	)	

Reply Comments of the

Competition Policy Institute

on the

Application of SBC Communications to Provide

InterLATA Service in Oklahoma

Competition Policy Institute
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May 27, 1997

I. INTRODUCTION AND SUMMARY

In its initial comments on this application, CPI argued that SBC has not met the preconditions for entry into the interLATA market established by the Telecommunications Act of 1996. SBC fails to carry its burden of demonstrating that it faces competition from a facilities-based competitor, fails to demonstrate that it has "fully implemented" the competitive checklist, and fails to satisfy the public interest test because it faces virtually no competition for local telephone service in Oklahoma.

In these reply comments, CPI focuses on the comments submitted by the Department of Justice (DOJ). While CPI agrees with the DOJ that the SBC application should be denied and agrees with much of the discussion in the DOJ's analysis, certain aspects of the DOJ's proposed standards require further elaboration. CPI believes that the DOJ's positions, if adopted by the FCC, could, in some circumstances, lead to premature entry by a Regional Bell Operating Company (RBOC) into the interLATA market.

II. THE DOJ'S RECOMMENDED DEFINITION OF "SUCH PROVIDER" DOES NOT APPEAR TO BE CONSISTENT WITH THE LEGISLATIVE HISTORY OR WITH SOUND POLICY.

CPI agrees with much of the DOJ's analysis of the interplay between Track A and Track B. As the DOJ states, "Congress assumed that firms would not yet be

operational competitors when they requested the interconnection and access arrangements necessary to enable them to compete." (DOJ Comments, p. 16) CPI agrees that, to read the phrase "such provider" in Track B to refer to a provider that is already serving residential and business subscribers over its own facilities, as SBC suggests, would have the effect of reading Track A out of the statute. The DOJ properly reasons that Track A was intended to give the RBOCs the incentive to cooperate with potential competitors before being allowed to provider interLATA service.

The DOJ then suggests, however, an interpretation of "such provider" that is unsupported by the legislative history. The DOJ contemplates that "such provider" must refer to a carrier that "plan[s] to provide service" over its own facilities. (DOJ Comments, p. 13). Interpreting "such provider" in a manner that includes the carrier's future intention appears several times in the DOJ's comments.[1] Apparently, the DOJ believes that, in order to decide that a carrier's request triggers Track A, the FCC must conclude that the requesting carrier both has its own facilities and intends to use those facilities to serve business and residential

[1]"[A] BOC may not begin providing in-region interLATA services before there are operational facilities-based competitors in the local exchange market, if there are firms moving toward that goal in a timely fashion." (pp. 17-18); "Both Brooks and Cox have manifested their intent to be facilities-based competitors and are working toward that goal." (p. 18); "Because SBC has received timely requests for interconnection and access from potential facilities-based carriers triggering the requirements of Track A . . . it is not eligible to proceed under Track B." (Pp. 19-20). (emphasis added in each case)

subscribers in the future.

Asking the FCC to make such a prediction about the future would appear to be inconsistent with the legislative history and would involve the FCC in difficult and unnecessarily complicated analysis. First, the Conference Report language uses the present, not the future, tense.[2] Second, for the FCC to engage in a form of mind-reading to determine a carrier's future intention is difficult, to say the least. Finally, even if the FCC could accurately divine a carrier's intention at the time of an RBOC application, this does not guarantee that the carrier will follow through on that intention. Carriers' intentions change over time as the marketplace evolves. A carrier's intention to enter a certain market can be affected by changes in the prices of services offered by the incumbent local exchange company, changes in the costs of deploying facilities, enactment of state legislation and municipal ordinances, judicial rulings, and many other factors.

In its initial comments, CPI suggested that the term "such provider" should be read as referring to any unaffiliated competitor for local exchange telephone service. In other words, CPI believes that Track B is not available once an RBOC receives a request for access and interconnection from any unaffiliated provider of

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[2]"[A] BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market." Conf. Rpt. 104-104, p. 148 (emphasis added))

telephone exchange service, whether that carrier has its own facilities at the time it submits its request or not. CPI demonstrated in its initial comments that this interpretation of the term "such provider" is consistent with the statutory language, since a similar term ("such competing provider") is used in the previous subparagraph to refer to an unaffiliated competing provider of telephone exchange service. This interpretation is also consistent with the legislative history, which requires that a carrier must "meet" the requirements of subparagraph A at the time it submits its application. As the DOJ acknowledges, requiring carriers to have deployed their own facilities prior to seeking access and interconnection makes little sense from a policy perspective and would have the effect of reading Track A out of the Act.

SBC has raised the concern in its application that interpreting "such provider" to refer to any competitor could subject the RBOCs to "gaming" by competitors. The argument is that competitors would request access and interconnection in order to prevent the RBOCs from applying under Track B and would then decline to deploy their own facilities deliberately in order to prevent the RBOC from gaining entry into long distance under Track A.

To the extent that the DOJ is responding to this concern by predicting a carrier's future intention, it is unnecessary. The concern raised by SBC and others that carriers would manipulate their own investment decisions in order to distort

the regulatory process is misplaced. The market gives carriers much stronger incentives than does the regulatory process. New entrants to the local telephone market are competing with each other as well as with the incumbent local exchange carrier. The decisions by the competing carriers will be driven by an analysis of the costs and revenues of serving different customers in different ways. Many of these local competitors have no affiliation with long distance companies and have no anticompetitive reason to keep the RBOCs out of the long distance market. The RBOCs are already providing service in their market, and their incentive is to serve new customers as fast as possible before someone else can. Indeed, the fundamental assumption behind the passage of the Telecommunications Act of 1996 is that market forces will determine whether carriers choose to compete using resale, unbundled elements or using their own facilities. At most, it would be penny-wise and pound-foolish for a competitor to forego the opportunity to deploy its own facilities to acquire new customers when it is economic to do so simply to keep the RBOCs out of the long distance market, for its competitors will certainly enter the market if it does not.

For this reason, the assumption that competitors would "game" the Track A and Track B regulatory process in order to prevent RBOC entry into long distance simply does not make economic or marketplace sense. Rather than attempt to shoehorn into the legislative language a test that would involve the FCC in the

difficult job of predicting each carrier's future intentions, it is much simpler and consistent with the statutory language for the FCC to adopt a "bright line" test concerning whether an RBOC has received a request under Track A.

CPI believes that interpreting "such provider" to refer to an unaffiliated competing provider of telephone exchange service provides the FCC with a test that will provide certainty to the industry and to the regulators rather than involving the FCC in the difficult task of determining each carrier's future intentions.

III. The DOJ's Public Interest Analysis Falls Short of Including All the Necessary Factors that Determine Whether a Market is Irreversibly Opened to Competition.

In its review of the public interest standard, the DOJ suggests that an RBOC must establish that the local markets in the relevant state are fully and irreversibly open to competition through the use of new networks, unbundled elements, and resale. (DOJ Comments, p. 41). Even though CPI suggested a different standard in its initial comments, CPI does not necessarily object to the standard suggested by the DOJ if it is properly applied. The DOJ, however, failed to include in its analysis all the factors that determine whether a market is irreversibly opened to competition.

The checklist and the Track A/Track B approach provide the FCC with the ability to examine the state of competition from the perspective of the industry. Under these provisions, the FCC must determine whether the RBOC has fully

implemented the checklist and whether a competitor is serving business and residential subscribers using its own facilities.

The public interest test provides the FCC the opportunity to examine the question of RBOC entry from the perspective of consumers. In its initial comments, CPI suggested that the FCC should determine whether the public interest test is satisfied by examining whether consumers have a "realistic choice" for local telephone service. This standard provides the FCC with an opportunity to exercise its judgment and take a "common sense" view of an RBOC's application. In other words, the FCC should determine whether, on the whole, consumers will be better off if the RBOC is permitted to enter the long distance market. Since the long distance market already contains several hundred competitors, while the local market is virtually a monopoly, consumers as a whole will benefit more if they have a realistic choice of alternative local service providers before the RBOC serving that territory is permitted to enter the long distance market.

The DOJ's proposed "irreversibly opened to competition" standard, could, if correctly applied, be the "flip side" of CPI's "realistic choice" standard. In other words, an RBOC can only demonstrate that a market is irreversibly opened to competition if consumers have a choice of alternative providers.

The difficulty with the DOJ's discussion, however, is that its analysis of whether a market is irreversibly opened to competition appears to depend almost

exclusively on whether the RBOC has completed its obligations to unbundle the local exchange network. For instance, the DOJ cites SBC's failure to provide adequate physical collocation, interim number portability, and wholesale support systems as reasons for the lack of local competition in Oklahoma. (DOJ Comments, p. 59) The DOJ also cites SBC's failure to report its performance concerning provisioning and its failure to establish performance standards concerning the implementation of checklist items. The DOJ points to the lack of cost-based rates for unbundled elements (pp. 61-63). The last sentence of the DOJ's brief refers to the lack of competition and the various obstacles SBC has placed in the path of competitive entry as reasons why SBC does not satisfy the public interest test.

While these examples are truly significant and provide ample evidence of SBC's failure to satisfy the public interest test, the actions or inactions by SBC should not be the only category of factors that affect the public interest test. Many, if not all, of the examples cited by the DOJ are already required by the competitive checklist. The public interest test must mean something other than SBC's compliance with the checklist, however, if it is to have any meaning at all.

To determine whether a market is "irreversibly opened to competition" under the public interest test requires more than an analysis of the actions by the RBOC — it requires an analysis of all the other factors that affect the growth of local exchange competition. Some of these issues include:

1. Municipal ordinances that attempt to regulate telecommunications services or impose unreasonable conditions on the use of rights-of-way.

2. State legislation, such as laws enacted in Arkansas, Texas and Minnesota, and legislation pending in Oklahoma, may limit the potential of new entrants the provide competitive service.

3. Building owners often refuse to grant competitors access to their apartment buildings to provide competitive service to tenants.

4. Brand name recognition, or customer loyalty, often favors the incumbent telephone company over the new entrant.

5. The cost of capital to new entrants is often higher than the cost to the incumbent telephone company.

6. Eligibility for universal service support is sometimes is limited to the incumbent local telephone company, despite passage of the Federal Act.

7. Full number portability is not being provided today, and interim number portability does not provide competitors with equivalent and nondiscriminatory service.

8. Engineering complexities make it difficult for competitors to integrate resold services, unbundled network elements, and their own facilities in order to provide seamless service to the customer.

9. IntraLATA toll dialing parity is not provided in several states, making it

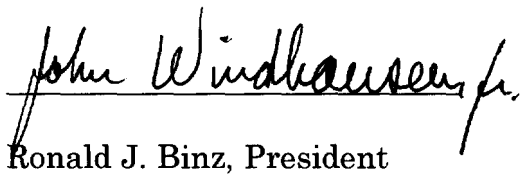
impossible for competitors to provide local and intraLATA toll service in the same manner as the incumbent telephone company.

10. Area code overlays discriminate against competitors for local telephone service by requiring all new telephone numbers in the same geographic area, such as those obtained by competitors, to be given a new area code.

11. Legal challenges to the FCC's interconnection rules and to state-arbitrated agreements cause delays in the ability of new entrants to obtain interconnection to the telephone companies' networks.

CPI is currently gathering information to provide more detailed information on many of these issues. Clearly, these issues affect the growth and development of local telephone competition, and they have a significant effect on whether a market is irreversibly opened to competition. Should the FCC agree with the DOJ that the public interest test depends upon whether a market is irreversibly opened to competition, CPI respectfully suggests that the FCC should broaden and deepen its analysis of the factors that affect the openness of the local market to include factors other than the actions or inactions of the RBOC. In the alternative, CPI suggests that the FCC should adopt a simpler, common-sense test of whether entry of an RBOC is in the public interest -- a test that measures whether consumers have a "realistic choice" for local telephone service in that State.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments of the Competition Policy Institute on the Application of SBC to provide in-region, interLATA service in the State of Oklahoma were served May 27, 1997 on the following persons be first-class mail or hand service as indicated.

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